No. 15141

In the United States Court of Appeals for the Ninth Circuit

BARTHOLOMAE CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

Appellant, a California corporation which owns and operates a cattle ranch in a sparsely populated area located 150 miles northwest of the Atomic Energy Commission's Nevada Proving Grounds, brought this suit for damages against the United States in the U. S. District Court for the Southern District of California (Central Division) claiming that cracks which appeared in the plaster walls and ceilings of four of its ranch buildings were caused by the firing of atomic weapons during a series of atomic tests in the fall of 1951. The complaint (R. 3–10) alleging jurisdiction under both the Federal Tort Claims Act and the Tucker Act, contains four "counts," the first asserting

liability on the theory that the atomic weapons were detonated in a negligent manner, the second asserting liability under the doctrine of *res ipsa loquitur,* the third seeking recovery under the doctrine of absolute liability, and the fourth on the ground that there was a "taking" under eminent domain principles. The answer, as amended (R. 8–10, 16), denies negligence and the other material allegations and asserts that the claims are barred by the discretionary function exception of the Tort Claims Act, 28 U. S. C. 2680 (a).

Following a trial before District Judge William M. Byrne, judgment was entered for the United States on December 22, 1955 (R. 30–31). The District Judge's Memorandum Decision (R. 17–23; 135 F. Supp. 651) and his Findings and Conclusions (R. 23–30) hold that the evidence shows no negligence, that the claims are based upon the performance of discretionary functions and therefore are excluded from the coverage of the Tort Claims Act, that there can be no recovery under that Act on an absolute liability theory, and that there was no taking of appellant's property within the meaning of the Fifth Amendment of the Constitution. Appellant filed a notice of appeal on February 16, 1956 (R. 31). This Court's jurisdiction rests on 28 U. S. C. 1291. The facts may be stated as follows:

1. Background: the planning and authorization of the 1951 atomic tests

In the fall of 1951 the Atomic Energy Commission conducted a series of nuclear experiments at its Nevada Proving Grounds, commonly known as

Frenchman's Flat. The primary purpose of these experiments was to secure information needed for the design of new and improved nuclear weapons (R. 189, 237). As part of this test series, four atomic devices were detonated during the period from October 22 through November 5, 1951 (R. 24–25, 183). Recommendations concerning the initiation of this particular test series, the nature of the experiments, the size of the devices, the number to be detonated, the site of the explosions and their approximate dates were considered, authorized and approved at the very highest executive level. Thus, these matters were the subject of consideration and approval by the Atomic Energy Commission, by special advisory committees associated with AEC, by the Secretary of Defense, by the Secretary of State, by the National Security Council, by specialized committees within the National Security Council, and by the President himself.

a. Establishment of the Nevada Proving Grounds

Selection of the Nevada Proving Grounds, which is roughly 150 miles southeast of appellant's ranch,[1] as the site for nuclear explosions similarly involved decisions at the highest level, including Presidential approval. Earlier atomic experiments had been conducted in the Pacific, at Bikini Atoll and at Eniwetok, but it soon became evident that a testing ground in the continental area would be of great advantage to the nation in terms of speeding up atomic weapons

[1] Cf. App. Br. p. 6, fn. 1.

development.[2] Other important advantages of a continental testing site related to substantial savings in manpower, time and money (R. 172–173).[3] The home site testing grounds also have important advantages to civil defense officials and provide opportunities for public education and understanding of the problems and hazards involved.[4] A further factor involved relates to the conduct of foreign affairs.[5]

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[2] R. 170; see *Assuring Public Safety in Continental Weapons Test* (U. S. AEC, 1953), pp. 79–82 (Pltf's Exh. 34).

[3] To set up tests in the Pacific area necessitates sending thousands of military, civilian and AEC personnel to overseas locations where they remain tied up for many months. Thus, the tests in the Pacific during 1951–1952 required the services of some 9000 persons; the tests at the Nevada Proving Grounds during the same period required less than 2500. *Assuring Public Safety*, *supra*, p. 82. A scientist or technician going to the Pacific is not available to the home laboratory for a long period, and the work at the home laboratory suffers in consequence, whereas the scientist or technician who participates in a test at Navada can return to the laboratory on the next day, and it is possible to evaluate the data from one detonation in time for the results to affect the next (*ibid.*; R. 172–173).

In terms of the saving of public funds, it is estimated that the cost of a Pacific operation would be about three times as much as one in continental United States (R. 172). Additionally, the Pacific operation in effect requires the building of a laboratory, whereas the laboratory is already in being at home. Furthermore, the laboratory equipment which is available at home often cannot be moved, or if it can be moved might not operate as efficiently under Pacific and tropical conditions. Additionally, removal would cause the interruption of work going on at home in which the same equipment is needed (R. 173–174).

[4] *Assuring Public Safety*, *supra*, at p. 82.

[5] Thus, when the international situation is tense or with the outbreak of war (as in the case of the Korean War) atomic experimentation in the Pacific may be highly inadvisable and

For these and other reasons, it was decided in 1950 to establish a continental test site. A survey of possible locations for such a site had been made in 1947. A new survey was made in 1950, and the Nevada site was chosen as most feasible. At that time the site was already a portion of an Air Force bombing range; it was only a few hours distance by air from the key laboratories engaged in the nuclear weapons development program; the relative isolation of the area provided safety factors in relation to blast and fall-out, particularly because the prevailing winds blow from the test site for many miles across a relatively unpopulated region; and, careful review of all research and test data indicated adequate assurance of public safety.[6] The determination was made by the Atomic Energy Commission in collaboration with the Department of Defense (R. 212). The determination was reported to the Special Committee on Atomic Energy of the National Security Council which is made up of the Secretary of Defense, the Secretary of State, and the Chairman of the Atomic Energy Commission. The National Security Council approved the determination and recommended it to the President who authorized the establishment of the Navada Proving Grounds as an area in which nuclear explosions would be conducted.[7]

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dangerous. Shipping virtually irreplaceable equipment overseas at such times would involve great risks and might encounter problems of shipping and manpower shortages (R. 171, 174).

[6] *Assuring Public Safety*, *supra*, at pp. 80–81; R. 174–175.

[7] R. 25–26; Affidavit of Walter J. Williams, Deputy General Manager of the Atomic Energy Commission, p. 1. This affi-

b. Planning and authorizing the atomic tests

The Los Alamos Scientific Laboratory is the Atomic Energy Commission's atomic weapons development laboratory. It has, among its functions, the responsibility of planning and conducting nuclear weapons tests (R. 165).[8] Each year the Laboratory prepares an Annual Program listing various items as to research, experimentation, nuclear tests, detonations, a description of those tests and their approximate dates, which are proposed for the coming year or possibly for the next two years (R. 176). The proposal for the atomic weapons test series such as are the subject of this case originate in such a Program prepared by the Los Alamos Laboratory (R. 25–26). The pro-

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davit was submitted in support of the Government's motion for summary judgment below and, although comprising part of the Record in this Court, was not printed. Appellant does not dispute the facts as to the determination of the site or as to the need for a continental testing site. See R. 212; see also R. 174–175.

[8] Testimony concerning the planning and carrying forth of the nuclear experiments which are the subject of this suit was given by three officials who rank high in our nation's atomic energy program: Dr. Alvin Cushman Graves, who, among his other important roles relating to nuclear development, headed the Division within the Los Alamos Laboratory which was responsible for atomic weapons testing (R. 164 *et seq.*); Brig. Gen. Kenneth E. Fields, who was Director of the Division of Military Application of the AEC, a position established by the Atomic Energy Act of 1946 (see 42 U. S. C. (1952 ed.) 1802 (a) 4 (B)) (R. 210 *et seq.*); and Dr. Everett Cox, one of the country's foremost experts in the field of blast effects, who is Manager of the Weapons Effects Department of the Sandia Corporation, an AEC ordnance laboratory and development organization (R. 242 *et seq.*).

posals are submitted by the Laboratory to the Director of AEC's Santa Fe Operations Office, which is an AEC field office exercising direct supervision over the work at the Los Alamos Laboratory (R. 168–169, 176). After consideration, the proposals are then submitted by that office to AEC's Division of Military Application which, after study and comment, transmits them to the Atomic Energy Commission. The Commission sends the proposals to its Military Liaison Committee and to its General Advisory Committee (R. 176–177).

The composition, functions, and powers of these Committees are provided for in the Atomic Energy Act of 1946, 42 U. S. C. 1802 (b) and (c). In brief, the Military Liaison Committee, composed of specialist representatives of each of the military Departments, after studying the proposals from the military aspect, obtains the approval or comments of the Department of Defense; the General Advisory Committee, composed of civilian scientists and technicians appointed by the President, considers the proposals from a scientific, research and development point of view. After receiving the views of these two Committees, the proposals are approved or otherwise acted upon by the Atomic Energy Commission. *Ibid.*; R. 176–177.

As the time for a particular approved series of nuclear tests gets closer, the Los Alamos Laboratory submits a specific proposal for that particular test series. This will include the recommendations as to the series previously included in the Annual Program,

but this time in much more detail. It will discuss the amount of fissionable material requred in its tests, its geometry, and it will justify each of the tests by indicating what is proposed to be learned and what the effect will be on the national arsenal of nuclear weapons. This detailed proposal proceeds through the same channels as the Annual Program, as described above. Upon the determination by the Atomic Energy Commission that the particular series of nuclear explosion experiments is necessary, it reports to the Special Committee on Atomic Energy of the National Security Council the general purpose of such experiments, the number of detonations to take place in the series, the approximate dates on which the series will take place and the approximate amount of fissionable material to be consumed. Thereafter, the matter is referred, with the recommendations of the National Security Council, to the President himself, and it is the President who actually approves and authorizes the particular nuclear explosion experiments.[9]

The procedures discussed above were followed in this case; the President and the Atomic Energy Commission authorized the nuclear explosions which took place in the fall of 1951 and directed that the testing be done at the Nevada Proving Grounds (R. 26).

2. Conducting the nuclear explosion experiments

After approval by the President, the detailed proposals for a particular test series are transmitted by

[9] R. 177; Affidavit of Walter J. Williams, *op. cit.*, *supra*, fn. 7, at p. 1.

the Commission to a Test Organization with instructions to proceed with the tests.

a. The Test Organization

Following these approvals, the Commission delegates authority to the Manager of the Santa Fe Operations Office to act as Test Manager and to conduct the tests. The Test Manager directs the Test Organization and has over-all responsibility for the operation. Under his direction, the Test Organization prepares a detailed proposal which specifies exactly what will be done in the conduct of the experiments and how it will be done. This detailed proposal is submitted to the Atomic Energy Commission and if it is approved that is the way in which the operation is conducted (R. 177). The Test Manager not only determines the schedule of operations to be followed, but he also determines the precise time at which the detonations will occur. His decision that everything is in readiness and that weather conditions are suitable for firing the particular shot is made after consultation with technical advisors concerning meteorological and other conditions. The Test Manager in this instance was Carrol L. Tyler.[10]

The official, under the Test Manager, who is responsible for actually firing the atomic devices when instructed to do so, is the Test Director. In this instance the Test Director was Dr. Alvin Cushman Graves, a highly qualified physicist of the Los Alamos Laboratory who had been closely associated with

[10] R. 26, 177, 181–183, 232; Affidavit of Walter J. Williams, *Op. cit.*, *supra*, fn. 7, at p. 2.

AEC's experiments for many years (R. 164–168, 179). As Test Director, he planned and conducted the hundreds of experiments which necessarily precede each detonation; he planned operations in connection with each shot; he was responsible for on-site and off-site radiological safety; and he was chairman of an Advisory Panel of scientists and experts which meets prior to each shot to consider the various factors involved in determining whether and when the particular shot should be fired (R. 179).

The Advisory Panel convenes approximately 12 hours before each shot is scheduled to be fired and remains on duty continuously until shot time considering weather data, fall-out data, blast prediction data, etc. The panel is composed of some of the nation's most qualified experts.[11] After being briefed on and after a discussion as to the weather, wind, meteorological and related conditions up until shot time, the Panel recommends to the Test Manager whether the shot should or should not be fired. The Test Manager,

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[11] Dr. Graves, the Chairman of the Panel, testified that in the October–November 1951 test series, "The panel at the time consisted of Dr. John Bugher, who is Chief of the Division of Biology and Medicine of the Atomic Energy Commission; Dr. Howard Andrews of the United States Public Health Service; Benjamin Holtzman, * * * one of the most competent meteorologists in the country. Dr. Thomas Shipment, who is the head of the Health Division of the Los Alamos Laboratory. Dr. Walker Bleakley of Princeton University, who is recognized as one of the foremost authorities on shock waves and blast effects. * * * General James Cooney, who was with the Division of Military Application as a radiological safety officer * * *." R. 180. Dr. Everett Cox, a blast effects expert, also served with the Panel (R. 180–181).

who participates in the Panel's briefing and discussions, has the responsibility of making the final decision (R. 181–182, 215). While of course no one has authority to depart from the approved plan of operations (R. 222, 234–235), the Atomic Energy Commission relies upon the judgment of the Test Manager to determine when conditions are optimal for public safety in all the circumstances (R. 26, 28).

b. Public safety: the factors involved and the precautions taken

(*i*) Throughout all of the procedures described above, from the planning stage to the firing of the shots, public safety is a primary consideration. Under public safety criteria set forth by the Commission, each particular shot must be individually justified in terms of its value to the country as a whole; the yield (*i. e.,* the estimated release of energy) of each shot and of the aggregate of shots is carefully considered and designated in advance; the amount of radio-active fall-out is specified in maximum terms with persons outside of the proving grounds in mind; and each atomic device which is to be detonated is designed with the minimum yield possible consistent with obtaining the information sought by the experiment (R. 178–179, 185, 204–207).

The principal factors involved from the viewpoint of public safety relate to fall-out of radio-active materials, blast or shock waves, and the flash of light which accompany the nuclear explosion. What effect these factors will produce depends largely upon the prevailing weather conditions. For example, a very high wind velocity present at all elevations could bring

about hazardous fall-out at a considerable distance from the detonation point and under such conditions, of course, the shot would not be fired (R. 216–219). Similarly, the brightness of the light flash, and the heat it throws, which could injure the eye tissues if one looks directly at the fireball, will vary with existent atmospheric conditions.[12] In this case, appellant contends its property was damaged by blast waves.

The blast waves emanate spherically in every direction from the point of detonation. The waves which strike the ground are immediately reflected up, causing a second spherical front (R. 249, 27). Dr. Cox, the blast effects expert, explained that if the atmosphere were perfectly uniform—with no change in temperature or winds at higher elevations—the wave hemisphere would get larger and larger and the concentration of blast energy would decrease in proportion to the square of the distance from the point of detonation, thus, twice as far away the energy concentration would be one-fourth as great, three times as far away it would be one-ninth as great, and so on. But the atmosphere is not uniform; there are changes in temperature and the wind directions and velocities also vary at different elevations and distances. Blast waves travel more slowly in cool air than in warm air, and because of the variance in temperatures at different elevations, the blast waves may bend back toward

[12] See *Atomic Test Effects in the Nevada Site Region* (U. S. AEC, 1955), pp. 5–7 (Pltf's Exh. 31). Viewed at a distance of 6 miles, the flash of light from a nominal detonation is 100 times brighter than the sun (*Assuring Public Safety in Continental Weapons Tests*, p. 85 (Pltf's Exh. 34).

the earth. When that happens, there is a concentration of blast waves (and of energy) which focus upon one spot; they strike the earth at the focal point and then bounce up again, and this process may be repeated. Each successive bounce will normally be less intense than the last.[13]

The effect of the blast will, of course, be greater where the blast waves are focused into one area.[14] The strength of the waves and the sharpness of the focus depend on the temperature and wind structure of the atmosphere (as well as on the yield and altitude of the shot itself).[15] The creation of focal points, and their location, are affected by the atmospheric layers above the earth's surface, for these masses of air at different heights generally differ in temperature. The *troposphere* (the atmospheric layer from the earth's surface to an elevation of 6 miles) will create focal points at shorter distances apart than will either the *ozonosphere* (the atmospheric layer extending from 25 to 40 miles above the earth) or the *ionosphere* (the atmospheric layer upwards of 50 miles above the earth).[16]

At the state of scientific progress attained at the time of the 1951 test series, it was not possible to predict whether there would be a significant bending of the blast waves and, if so, just where it would occur

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[13] R. 249–255, 264, 271; *Assuring Public Safety*, *supra*, at p. 86.

[14] Dr. Cox explained that the blast waves which were recorded at Las Vegas, Nev., in 1951, resulted from this focusing process; that the blast may have struck at a focal point one-third of the distance to Las Vegas, then bounced and struck at a focal point two-thirds distance away, and again at Las Vegas (R. 264).

[15] See *Atomic Test Affects*, *supra*, at pp. 11–12.

[16] See *Assuring Public Safety*, *supra*, at pp. 86–87.

(R. 27). However, Dr. Everett Cox had devised a method of predicting the blast pressures which might be anticipated at certain points. It was known that the probability of significant blast pressure at a distance of 150 miles resulting from low-level refraction was "very, very tiny" (R. 268–271). The problem at that distance is created by higher level refraction, *i. e.,* from the ozonosphere. Since weather data as to the ozonosphere is unobtainable (weather balloons did not reach that height), the method used was to set off, at the test site, a large number of one-ton explosive shots and to measure the pressures which the ozonosphere refracted down to earth. The refracted pressures were recorded on instruments known as microbaragraphs, which were placed in strategic areas located generally at points up to 150 miles away from the site of detonation. Then, approximately one hour before the nuclear detonation was scheduled to be fired, another such high explosive shot was set off; the readings obtained from that shot would be related to the readings previously recorded and, through a process of scaling upward, a prediction would be made as to the pressures which would be caused by the nuclear detonation (R. 272–273, 278–279).[17]

[17] The prediction necessarily was based on the assumption that the high level atmospheric conditions would remain constant during the hour between firing the explosive and firing the atomic device. The time spread was needed to allow the sound waves to reach the recording instruments, to allow personnel to read the instruments and then communicate the data to the test site, to compute and analyze the data after it was obtained at the test site, and possibly to issue protective warnings to the populace in areas where fairly high pressures could be predicted

The information and predictions based upon the microbaragraph readings and computations were submitted to the Advisory Panel for consideration along with up-to-the-minute reports of weather conditions submitted by a network of permanent and mobile weather stations situated throughout the general area (R. 179–183, 305–307; see *Atomic Test Effects, supra,* p. 37; see also *Assuring Public Safety, supra,* pp. 96–100).

(*ii*) At the time of the 1951 tests there were only eight microbaragraphs existent in the United States (R. 273). Everyone of these instruments was obtained, and they were placed at selected points to secure readings which, in the best judgment of the experts, would assure maximum safety for the greatest number of people. Dr. Cox testified (R. 294):

> In August and through the test series of 1951 there were eight of these microbaragraphs available in the country. I borrowed all eight, and I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. I was not able, with the eight instruments, to place an instrument at every farm house, ranch, that might be within the zone of receiving these pressures. I had to decide where I would place them to get the maximum protection for the maximum number of people.

(R. 275–276). A considerable margin of error could be expected, however, because of the nature of the scaling formula and because of the possible change in high elevation atmospheric conditions subsequent to the firing of the explosive (*ibid.*; R. 291–292; and see *Assuring Public Safety, supra,* at pp. 88–89).

With this objective, the microbaragraphs were placed in the direction of and within the heavily populated communities, *e. g.*, in Las Vegas, in Henderson, and in Boulder City, and none was placed to the north in the vicinity of appellant's ranch (R. 27, 294–296).

That there would be a series of nuclear detonations was, of course, widely publicized, through newspapers and other communications media, so that the explosions and the dates on which they would take place was a matter of common knowledge to all in the Nevada area (R. 124–125).[18] As already noted, the atomic devices are designed to produce the minimum yield possible consistent with obtaining the information sought by the experiment (R. 178–179). The initial determination that it is safe to fire such a device, from the standpoint of people located at a distance, is made at the time the program itself is under consideration and is approved (R. 216). Public safety is one of the factors involved in determining whether the test should be made in the Pacific or at the Nevada Proving Grounds (R. 214, 218–219). In this instance, no serious hazard to the public was anticipated (R. 214), although it was anticipated that there might be some minor damage done outside of the limits of the test site (R. 221, 238). But such off-

[18] All such tests are accompanied by advance notice to the public; helicopter and ground patrols, and posted notices, are used to warn desert migrants and hunters; public officials and health officers of communities which may be affected are alerted; civil defense organizations may be notified; through the Civil Aeronautics Authority, planes are routed away from the area; a nationwide radiation monitoring system operates to trace the fall-out; etc. See *Assuring Public Safety*, *supra*, pp. 99–100.

site damage would depend largely upon weather conditions, and elaborate precautionary measures, particularly with reference to weather prediction, were taken to avoid significant off-site damage (R. 305–307).

The firing of the nuclear device occurs, as we have already noted, only after the Test Manager, upon consultation with his Advisory Panel of technicians and scientists, determines that the conditions are optimum for public safety under all the circumstances (R. 28).

3. The contentions below and the decision of the district court

Appellant's ranch, consisting of some 350,000 acres and a dozen well constructed buildings, is located about 20 miles from the town of Eureka and some 150 miles northwest of the Nevada Proving Grounds (R. 24, 148, 151). Appellant contended below that cracks in some of the plaster walls and ceilings of 4 of the buildings, which allegedly appeared shortly after the October-November 1951 test series, were caused by blast waves, and that these cracks were not due to settling of the building or to "curing" of the plaster or to temperature changes (R. 133–135). Defense testimony, on the other hand, described the cracks, some of which were new and some old (R. 324), as "typical average plaster cracks" (R. 311) such as would develop in every building of like construction (R. 320) as a result of changes in temperature (causing expansion and contraction of the plaster) and as a result of settlement of the building (R. 318–319), or

as a result of a poor mix of plaster or a poor adhesion to the rock lath (R. 312).

Appellant argued below that Dr. Cox was negligent in placing the microbaragraphs in the populated communities (4 south of the test site, at Indian Springs, Las Vegas, Henderson, and Boulder City; 2 east, at Caliente, Nev., and St. George, Utah; 1 west, at Beatty; and 1 northwest, at Goldfield), but none north, in the vicinity of its ranch. Appellant also relied on *res ipsa loquitur,* on the doctrine of absolute liability, and on the contention that there had been a "taking" of its property.

The district court found that there was no negligence involved (R. 29); that, on the contrary, "every precaution for the public's safety was exercised, commensurate with the task to be performed, and the equipment and scientific knowledge available" (R. 28–29); and that appellant had failed to prove that the atomic detonations were the proximate cause of its damage (R. 29, 18). The *res ipsa loquitur* doctrine was held inapplicable since appellant had failed to establish what "thing" had caused the plaster cracks, and since plaster cracks ordinarily occur in the absence of negligence (R. 18, fn. 1). The court held that appellant's claims are based upon experimental and discretionary activity authorized at the highest level of Government and are barred by the discretionary function exception of the Tort Claims Act (R. 20–21, 29). Appellant's alternative arguments that recovery should be had on the basis of absolute liability and on the basis of a "taking" were rejected (R. 22–23, 29–30). This appeal followed.

STATUTES INVOLVED

The pertinent provisions of the United States Code, of the Federal Tort Claims Act, and of the Fifth Amendment of the Constitution are set forth in the Appendix, *infra,* pp. 75–76.

ARGUMENT

Introduction and Summary of Argument

It is difficult to point to any undertaking of the Federal Government which is as vital to the defense and security of our nation and which is as momentous a factor to the future economy and progress of our people, and of all peoples, as is the atomic energy development program. It is a matter of common knowledge that this program, which brought forth atomic weapons and thereby hastened the close of World War II and since then unquestionably has functioned as a potent influence in averting other major conflicts, has received priority consideration throughout the Government, has involved huge investments of public funds, and has occupied the time of tens of thousands of government and civilian personnel including the country's foremost scientists.[19] The program is of such importance, the fissionable materials consumed in experimentation are so valuable, the dangers accompanying nuclear detonation are so awesome, that, as the evidence in this case showed, each significant step in the program is submitted to, is considered by, and receives the authori-

[19] See *Assuring Public Safety*, *supra*, at p. 3, *et seq.*

zation and approval of executive officials at the very highest level, including the President himself.

The firing of the atomic shots which allegedly caused damage to appellant's property in this case was pursuant to a nuclear experimental program which was authorized and approved by the highest executive level of the Government after a consideration of all relevant factors including the possibility of damage beyond the test site, and the particular detonations complained of, as well as the manner in which the tests were conducted, were specifically designated by that program.

In these circumstances the Tort Claims Act may not be used as a vehicle to impose liability for resultant damages. The discretionary function exception, 28 U. S. C. 2680 (a), was inserted in the statute precisely for the purpose of "avoiding 'any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity,' merely because 'the same conduct by a private individual would be tortious'"; it was not intended to permit suit on claims based upon "the execution of a Federal project and the like"; it was not intended to provide a remedy for damages caused by discretionary acts "whether or not negligence is alleged to have been involved." *Dalehite* v. *United States,* 346 U. S. 15, 27, 29; *Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463,* pp. 25, 33.

In the present case it is unnecessary to consider the merits of appellant's claims as to negligence

(which the District Court nevertheless found to be without substance), for it is clear that the decision to detonate the nuclear devices in the manner it was done and under the prevailing conditions was made in the exercise of a discretionary duty. Accordingly, it is evident at the outset that the courts have no jurisdiction over the claim.[20]

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[20] That the exclusions of 28 U. S. C. 2680 are *jurisdictional* in nature is now firmly settled. Thus, in *Dalehite*, where the facts established that the claim was within the discretionary function exception, the Court held that "as a matter of law the facts found *cannot give the District Court jurisdiction* of the cause under the Tort Claims Act" (346 U. S. at 24; emphasis added). In the same case (346 U. S. at 31, fn. 25), it was stated that, "In *United States* v. *Spelar*, 338 U. S. 217, we held that our courts *did not have jurisdiction* to try a tort action for * * * an accident * * * in Newfoundland. This conclusion was reached because of the exception, § 2680 (k), of 'Any claim arising in a foreign country.'" In the recent decision of *United States* v. *Taylor*, 236 F. 2d 649 (C. A. 6, petition for certiorari pending), it was held that because a defense based on § 2680 is jurisdictional, it may be raised for the first time on appeal; an earlier decision contra, *Stewart* v. *United States*, 199 F. 2d 517 (C. A. 7), was not followed. Other cases viewing the defense of § 2680 to be jurisdictional include *Stepp* v. *United States*, 207 F. 2d 909, 910 (C. A. 4); *Gubbins* v. *United States*, 192 F. 2d 411, 413 (C. A. D. C.); *Coates* v. *United States*, 181 F. 2d 816, 817 (C. A. 8); *Grigalauskas* v. *United States*, 103 F. Supp. 543, 547 (D. Mass.), aff'd, 195 F. 2d 494 (C. A. 1).

This result plainly flows from the language of 28 U. S. C. 1346 (b) (*infra*, p. 75) which confers tort jurisdiction on the district courts "subject to the provisions of chapter 171 of this title", and § 2680 is an important part of chapter 171. The opening words of § 2680 are, "The provisions of * * * section 1346 (b) * * * *shall not apply to*—", and various excluded types of claims are then specified. Clearly, then, the claims specified

1. In our first point below we show that appellant's claim falls under the discretionary function exception. Preliminarily we discuss the nature and scope of the exclusion, pointing out that the words of the exception derive their meaning from the settled common law concept, reflected in many cases prior to enactment of the Tort Claims Act, that public officials and public bodies are not answerable in damages for the consequences of official conduct involving the exercise of judgment or discretion of a public character. One aspect of this rule is that governing bodies are not subject to suit for tort based upon defects in a plan for public works. The adoption of the plan is an exercise of deliberate discretion. Another aspect of the rule, firmly rooted in reasons of public policy, precludes a court or jury from substituting its judgment for that of an official upon whom the law imposes the duty of exercising his discretion. If the official is not performing a ministerial act, he is personally immune from suit based upon an alleged mistake of fact in the exercise of his judgment. In that connection, the pre-Tort Claims Act cases make no distinction whatever between operational and planning level conduct, such as appellant relies on here, but look instead to whether the act itself is discretionary as distinguished from being ministerial.

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in § 2680 are not within the jurisdiction conferred by § 1346 (b).

This Court's decision in *Air Transport Associates* v. *United States*, 221 F. 2d 467, 470, holding that a defense based on § 2674 is not jurisdictional is not contra to the above cases, for *Air Transport* did not involve or consider § 2680 defenses. Cf. *United States* v. *White*, 211 F. 2d 79, at 82, fn. 3 (C. A. 9).

2. We then show that these settled principles have been adopted and applied under the Tort Claims Act, both before and since the *Dalehite* decision which itself illustrates the application of these two aspects of the rule. We show that appellant's claim in this case must fail under either of these aspects of the discretionary function principle. The series of atomic experiments included in this case is the type of Federal project which Congres had in mind when it wrote the discretionary function exception into the Act. The nuclear detonations allegedly causing the damage were conducted pursuant to detailed plans which were prepared by the Test Organization and which were adopted and approved by the Atomic Energy Commission. Appellant failed to establish any departure or deviation from these detailed plans. On the contrary, the record shows that the approved plans specified all of the pre-atomic shot functions and that these plans were carefully carried out.

We note below that the Atomic Energy Commission vested the Test Manager alone with the duty of determining when each shot was to be fired based on his judgment that weather conditions were such as to provide maximum public safety. The panel of experts, including Dr. Cox, were acting only in an advisory capacity to the Test Manager. The Test Manager's determination was an exercise of immune discretion. No inquiry may be made as to what factors he considered in making that determination, for to do so would be to review his exercise of judgment. The information supplied by Dr. Cox to the Test

Manager is relevant only if appellant is to be permitted to go behind the Test Manager's discretionary decision to see what factors determined that decision, and that should not be permitted. In any event, Dr. Cox was himself vested with discretion as to the manner of conducting his tests. His decision to locate his few microbaragraphs within the populated communities so as to give the maximum protection to the greatest number of people was known to the Test Manager and was itself an act of judgment involving considerations relating to the public interest. As such it is covered by the discretionary function exception.

3. We next discuss appellant's argument that the discretionary function exception does not apply to operational level conduct. We show that this limitation on the coverage of the exception finds no justification either in the language of the Act or in its legislative history, and that a careful reading of the Supreme Court decisions in the *Dalehite, Indian Towing,* and *Union Trust* cases indicates that that Court has never passed on the point. The determinative fact in the application of the exception is not the level of the official but the discretionary nature of his act, and this is confirmed by many decisions both prior to and under the Tort Claims Act. It is evident, nevertheless, that both the Test Manager and Dr. Cox were not, in their respective spheres, operational level officials.

4. Discussing the merits, we show in our second point that the trial judge's finding that there was no negligence involved is amply supported by the

record. Throughout the operation, assuring maximum public safety was a primary consideration. It was for that reason that the available microbarographs were placed near the most populated communities rather than in a sparsely populated area like that of appellant's ranch.

5. In the remaining points we demonstrate that the trial judge was correct in holding that *res ipsa loquitur* is not applicable on the record made here, in holding that there can be no liability under the Tort Claims Act on an absolute liability theory, and in holding that there was no "taking" in the constitutional sense.

I

Appellant's claim is barred by the discretionary function exception of the Tort Claims Act

A. The nature of the discretionary function exception

Repeatedly described in Congress as "a highly important exception",[21] the discretionary function exclusion marks one of the basic limitations on the otherwise broad coverage of the Tort Claims Act. It excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U. S. C. 2680 (a)). While we know of no decision which has attempted a comprehensive definition of the words

[21] See H. R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; Sen. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. R. Rep. No. 1287, 89th Cong., 1st Sess., pp. 5–6.

"discretionary function or duty," it is known that these words have long been familiar to the law. As used in the Act, they express a "concept of substantial historical ancestry in American law" (*Dalehite, supra,* 346 U. S. at 34); Congress deliberately chose them "with the intent that they should convey the same meaning traditionally accorded by the courts" (*Coates* v. *United States,* 181 F. 2d 816, 818 (C. A. 8)). Accordingly, guidance in determining the nature of the exception and its application should be sought initially in the non-Tort Claims Act cases which have applied the discretionary function principle in the past, and these cases are legion.

We shall discuss below, first, the principles set forth in certain of these non-Tort Claims Act cases, and, second, the application of these principles in decisions under the Tort Claims Act.

1. *The non-Tort Claims Act cases*

Long before enactment of the Tort Claims Act, the discretionary function concept had developed meaning from cases in three areas: (1) mandamus or injunction actions to compel performance of discretionary duties (*e. g., Marbury* v. *Madison,* 1 Cr. 137, 170; *Decatur* v. *Paulding,* 14 Pet. 497, 514, 515); (2) damage suits against public officials for performing authorized acts involving the exercise of judgment and discretion (*e. g., Kendall* v. *Stokes,* 3 How. 87, 97, 98; *Spalding* v. *Vilas,* 161 U. S. 483, 498; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949); and (3) actions against municipalities for injuries resulting from the performance of certain

governmental discretionary functions (*e. g., Barrett* v. *State of New York,* 220 N. Y. 423, 116 N. E. 99). The controlling principle to be drawn from these three bodies of law is that it is not the place of the courts to revise, supervise or control executive conduct involving the exercise of judgment, choice or discretion of a public character.

Through the years, it has been the consistent holding of the courts that, despite injury to the plaintiff, the courts will not direct or enjoin or review the conduct of an official when that conduct involves the exercise of his judgment or discretion, as distinguished from conduct which is merely ministerial. Otherwise, the courts would be substituting "their judgment or discretion for that of the official entrusted by law with its execution" (*Louisiana* v. *McAdoo,* 234 U. S. 627, 633), and that "would be productive of nothing but mischief" (*Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131–132). Even where suit is permitted against a government, none will lie if the cause is based upon the exercise of discretionary powers (cf. *Weightman* v. *The Corporation of Washington,* 1 Black 39, 49; *Turner* v. *United States,* 248 U. S. 354, 358). When it exercises a discretionary governmental function "for the benefit of the public at large, * * * no one can complain of the incidental injuries that may result" (*Barrett* v. *State of New York,* 220 N. Y. 423, 427, 116 N. E. 99, 100).

While the discretionary function principle has been applied in a variety of situations, here we direct attention to two in particular: (1) its application in

connection with the design of public works or projects—with which the atomic experiment program is readily identifiable—and (2) its application in connection with official conduct, not ministerial in character, where it is the duty of the officer to exercise his judgment and discretion. Concerning the first: cases involving states and municipalities uniformly have held that the governing body is not liable for damages to an individual for any defect or fault in the plan or design of public projects (like dams, sewers, or highways), because the adoption of the plan involves "the exercise of deliberate judgment and large discretion * * * and the exercise of such judgment and discretion * * * is not subject to revision by a court or jury in a private action" (*Johnston* v. *District of Columbia,* 118 U. S. 19, 20–21; and see cases collected in 90 A. L. R. 1502).

As to the second type of situation, time and again, in non-Tort Claims Act cases, the courts have held the discretionary function principle to be an absolute bar to imposing liability on the official himself for the untoward or harmful consequences of some decision made in exercising the duties of his office, where inherent in such duties were the factors of judgment, choice, selection and discretion—and in refusing to impose liability the courts have regarded as immaterial charges that the official was negligent or even that he acted with a malicious or other improper motive.[22] If the act complained of "was done within

[22] Cabinet officers—*Kendall* v. *Stokes*, 3 How. 87; *Spalding* v. *Vilas*, 161 U. S. 483, 498–9; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S.

the scope of the officer's duties as defined by law, the policy of the law is that he shall not * * * be liable * * * because of a mistake of fact occurring in the exercise of his judgment or discretion," and the reason for the rule "is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public

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605; *Glass* v. *Ickes*, 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; the Comptroller of the Currency, a United States Attorney and his assistant—*Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; Members of the Securities and Exchange Commission—*Jones* v. *Kennedy*, 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; a member of the Tariff Commission—*Smith* v. *O'Brien*, 88 F. 2d 769 (C. A. D. C.); a member of the Parole Board, the warden of a Federal Penitentiary, and the Director of Federal Prisons—*Lang* v. *Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; Selective Service Board officials—*Gibson* v. *Reynolds*, 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Dodez* v. *Weygandt*, 173 F. 2d 965 (C. A. 6); Army officers and subordinate bureau chiefs—*De Arnaud* v. *Ainsworth*, 24 App. D. C. 167 (C. A. D. C.), error dismissed, 199 U. S. 616; *Burns* v. *Spiller*, 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792; a District Director of the Immigration and Naturalization Service, Immigration, Officer in Charge and Immigration Inspector—*Papagianakis* v. *S. S. Samos*, 186 F. 2d 257 (C. A. 4), certiorari denied, 341 U. S. 921; *Gregoire* v. *Biddle*, *supra;* District of Columbia Commissioners—*Brown* v. *Rudolph*, 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; officers of the Home Owners' Loan Corporation—*Adams* v. *HOLC*, 107 F. 2d 139 (C. A. 8); police officers—*Laughlin* v. *Garnett*, 138 F. 2d 931 (C. A. D. C.), certiorari denied, 322 U. S. 738; a deputy fire marshal—*Phelps* v. *Dawson*, 97 F. 2d 339 (C. A. 8); and subordinate government attorneys—*Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503.

service'" (*Cooper* v. *O'Connor,* 99 F. 2d 135, 138, 141–142 (C. A. D. C.), certiorari denied, 305 U. S. 643; see also, *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949, and the authorities cited in fn. 22, *supra,* pp. 28–29).[23]

In view of appellant's argument here (App. Br. 18–23), it is important to note that this latter line of cases, which comprises one of the primary, if not the principal, non-Tort Claims Act sources for the meaning of the words "discretionary function," draws no distinction as to the echelon or level at which the official acts. These cases do not say that his judgment is protected only if he is a planning official, but not if he is at a so-called operational level, and quite obviously many of the cases apply the principle of immunity to officials who cannot possibly be regarded as planning officers (see fn. 22, *supra*). What the

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[23] The immunity given to the official in connection with the negligent or wrongful performance of his discretionary duties is in no way intended to condone his improper conduct. The official is subject to disciplinary action by his superiors and he may be punished by some form of public prosecution, but not by way of a civil action by those who have suffered damage in consequence of his default in duty. Cf. *South* v. *State of Maryland,* 18 How. 396, 402–3. To permit an official's discretionary conduct to be reviewed in court at the instance of a private party "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith", and, on balance, the public interest is better served by leaving unredressed the wrongs of certain officials than to subject all "to the constant dread of retaliation" (Judge Learned Hand in *Gregoire* v. *Biddle,* *supra,* 177 F. 2d at 581).

courts have done is to examine and analyze the *function* and *duty* of the office, and if the function calls for the incumbent's exercise of judgment or discretion, the principle is held to apply even though the official is at what appellant would here characterize as the operational level. The distinction these cases draw is between discretionary and ministerial conduct, and not between operational and nonoperational level conduct. The emphasis is on the *function* being performed, and that is held controlling, not the level at which it is performed.

The same is true in suits against states and municipalities, as distinguished from suits against the officials personally: local governments are held immune from suit for negligence in connection with discretionary functions such as fire-fighting,[24] health and safety measures,[25] or traffic control,[26] or in other matters relating to the protection of life or property,[27] even though the negligence was by so-called operational level officials.

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[24] *Rhodes* v. *Kansas City*, 167 Kan. 719; *Fisher* v. *City of Boston*, 104 Mass. 87.

[25] *Mead* v. *City of New Haven*, 40 Conn. 72; *Young* v. *State of New York*, 278 App. Div. 997, 105 N. Y. S. 2d 657, aff'd, 304 N. Y. 677, 107 N. E. 2d 594.

[26] *Ferrier* v. *City of White Plains*, 262 App. Div. 94, 28 N. Y. S. 2d 218.

[27] *E. g. Murrain* v. *Wilson Line*, 270 App. Div. 372, 59 N. Y. S. 2d 750, aff'd 296 N. Y. 845 (negligence in controlling a crowd); *Schuster* v. *City of New York*, 121 N. Y. S. 2d 735, aff'd, 286 App. Div. 389, 143 N. Y. S. 2d 778 (failure to provide protection to an individual after notice of threats upon his life); *Brogan* v. *Philadelphia*, 346 Pa. 208, 29 A. 2d 671 (failure to protect a traveller from dangerous conduct of others on a highway); *Savage* v. *D. of C.*, 52 A. 2d 120 (D. C. Mun. App.)

The question of whether an official is at an operational level as opposed to a planning level is of significance, it would seem, only as a guide in applying the other line of cases we have discussed, that is, those dealing with negligence in the plan or design of public works. If the negligence can be traced to the design or plan of the works, there is no liability, for the planning of public works requires the exercise of judgment and discretion involving factors relating to the public interest. If, on the other hand, the negligence occurs in the mechanical execution of the plan, there may be liability. Cf. *Johnston* v. *District of Columbia, supra.* But the reason is that the operational level function of executing the plan normally does not require such an exercise of judgment; it is a function which is ministerial in character, and the courts so hold (see cases cited at 90 ALR 1512–3).

There can be situations, however, in which an operational-level employee may be vested with discretion, too, even where public works are involved. And, if

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(police broke into and took possession of plaintiff's house and belongings); *Giordano* v. *City of Asbury Park*, 91 F. 2d 455 (C. A. 3), certiorari denied, 302 U. S. 745, 799 (false arrest); *Borough of Norristown* v. *Fitzpatrick*, 94 Pa. 121 (failure to halt firing of a cannon in street); *O'Rourke* v. *Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 19 LRA 789 (same); *Trower* v. *City of Louisiana*, 198 Mo. App. 352, 200 S. W. 763 (same); *City of New Orleans* v. *Abbagnato*, 62 Fed. 240 (C. A. 5) (failure to prevent a lynching); *The Nez Percé Tribe of Indians* v. *United States*, 95 C. Cls. 1, 9–11, cert. den. 316 U. S. 686 (failure to prevent removal of gold from tribal land); *Turner* v. *United States*, 51 C. Cls. 125, 153, aff'd, 248 U. S. 354 (failure to prevent destruction of property); cf. *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 291.

that is the situation, there can be no liability for the negligent exercise of discretion. Thus, the overall plan of a public project may be silent as to the design of some particular aspect of the project and broad discretion may be delegated to a subordinate official, say the supervising engineer on the scene, to work out and adopt the plan of this particular phase of the work. Where that occurs the operational-level employee is, to the extent that he creates the plan himself, on a planning level. Similarly there may be situations during the execution of a public project involving an exercise of discretion which has no direct relationship to the physical plan of the project itself. For example, an official on the site of construction involving a secret installation may be vested with power to prohibit travelers from entering a particular area or from using a road from which the secret work can be observed while the work is going on. Invoking such a prohibition manifestly would be a discretionary act and, in legal principle, more appropriately would fall under the second line of cases discussed above (pp. 28–31), rather than the first (p. 28).

This, we think, suggests one of the inadequacies of the use of the term "operational level conduct" as an all-inclusive test for application of the discretionary function principle. The true test of immune discretion is the nature of the official's duty, not the level or echelon of his office. If it is his duty to exercise judgment and discretion, and his function is not, in the traditional sense, a ministerial one, he is not answerable in damages for a mistake of judgment.

The cases referred to in fn. 22, at pp. 28–29 above, demonstrate this. See also, *infra,* pp. 52–57.

2. *The Tort Claims Act cases*

The cases decided prior to enactment of the Tort Claims Act demonstrate plainly that the words "discretionary function" constitute a long familiar formula in the jurisprudence holding governing bodies, and their employees, free from liability for mistakes in judgment in connection with their public duties. This basic principle, firmly settled at common law, was carried into the Tort Claims Act through the discretionary function exception. Giving the words of that exception their traditional meaning, as Congress intended and as the courts have held (*supra,* p. 26), indicates that the United States cannot be held liable (1) where the individual official or employee is himself immune from liability, because of the performance of a discretionary act, (2) where an injunction or mandamus to compel performance of the act in question would be refused on the ground that the function involves judgment or discretion, or (3) where a city or state would not incur liability because the particular function is regarded as discretionary.[28]

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[28] While the *Indian Towing* decision, 350 U. S. 61, 65, rejected the idea that the Tort Claims Act incorporates the governmental v. proprietary principles of municipal corporation law, that decision did not deal with the problem of discretionary functions, which of course is a distinct matter. Thus, *Indian Towing* in no way suggested that municipal law cases holding a city immune for defects in the plan of public works are not applicable to the United States under the Act.

The legislative history of the Act and specifically of the discretionary function exception, which are extensively reviewed in the *Dalehite* decision, 346 U. S. 15, confirms this approach. That history reveals an acute Congressional awareness, and intention, that certain areas of governmental conduct should not be the subject of governmental liability under the Act, even though such conduct may result in damage to an individual. As to such matters, the Government has withheld its consent to be sued, and the doctrine of sovereign immunity, although it has been greatly diminished by statute in recent years and especially through this Act, is still an insurmountable barrier.[29] The legislative history establishes beyond any question that Congress intended the exception to bar suit not only when the claim is footed on an official's act of judgment, but also when the claim challenges "the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act * * *. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, *the execution of a Federal project and the like*" (346 U. S. at 27; emphasis added).

[29] Congress recognized that because of the exceptions and exclusions of the Tort Claims Act there would still be occasion for the private bill remedy—in instances of hardship or moral obligation or in other equitable situations where the terms of the statute barred recovery. See, e. g., Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, pp. 34, 38, 39, 52–53; Hearings before Subcommittee No. 1 of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess. on H. R. 7236, pp. 15, 22.

The *Dalehite* case is, of course, the leading decision on the application of the exception.[30] There, after discussing the legislative background of the exception, and after pointing out that the words cover "not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33; emphasis added), and, further, that the discretion covered includes "the discretion of the executive or the administrator to act according to one's judgment of the best course" (346 U. S. at 34), the Supreme Court stated that "it is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35). "It is enough to hold," the Court said (pp. 35–36), that—

> the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes *more* than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules

[30] *Dalehite* was a test case involving personal and property claims resulting from the disastrous explosion at Texas City, Tex., of fertilizer grade ammonium nitrate (FGAN). The FGAN had been produced for the United States pursuant to a program designed to increase the food supply of devastated areas in occupied enemy countries following World War II. The United States undertook the program to meet its obligation as an occupying power and to dispel the dangers of internal unrest. 346 U. S. at 17, 19. The district court made findings of negligence, first, with regard to the manufacture, bagging, and shipment of a dangerous product, *i. e.*, the FGAN (346 U. S. at 23, 37–42, 46–47), and second, with regard to the conduct of the Coast Guard in policing the shipboard loading of the dangerous substance and in fighting the fire which later developed (346 U. S. at 23–24, 42–43).

> of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion. [Emphasis added.]

Applying this definition to the issues before it, the Supreme Court concluded that each of the following governmental decisions challenged by the plaintiffs in that case were discretionary: (1) the cabinet level decision to institute the fertilizer (FGAN) export program (346 U. S. at 37); (2) the decision as to whether further experimentation with FGAN was needed to determine the possibility of its explosion under conditions likely to be encountered in shipping (*id.* at 37–38); (3) the drafting of the basic "Plan" of manufacture of the FGAN (*id.* at 38–42); and (4) the failure of the Coast Guard to regulate and police the storage or loading of the FGAN in some different fashion (*id.* at 42–43).[31]

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[31] The close parallel with the present case should be noted in passing. The decision in *Dalehite* to institute the FGAN program is analogous to the decision in this case to institute the atomic test series; the drafting of the plan to manufacture the FGAN in *Dalehite* is analogous to the plan, in this case, for the conduct of the tests; and the decision in *Dalehite* against further experimentation with FGAN is directly analogous to the decision in the present case against using one of the eight microbaragraphs to record the pressures of the preliminary high

In its application of the discretionary function exception the *Dalehite* opinion certainly did not reject, but on the contrary, expressly adhered to the historical meaning of the phrase as developed in the non-Tort Act cases. Clearly, insofar as the decision denied liability for asserted defects in the basic plan, it was consistent with the public works cases discussed above. Plainly, insofar as it denied liability for allegedly wrongful decisions by officials vested with discretionary duties, it was consistent with the second line of cases we discussed above. And, manifestly, insofar as it denied liability for alleged wrongful acts in regulating and policing the storage, and in fire-fighting, traditional principles were being applied. The short of it is that the *Dalehite* interpretation and application of the discretionary function language fully adopts, rather than delimits or departs from, the settled meaning of the words as developed in the non-Tort Act cases.[32]

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explosive shots in the sparsely populated area of appellant's ranch.

[32] Even the dissent was in basic agreement as to the principles involved; the disagreement was principally in their application to the facts. The dissent would have imposed liability under the rule that while a governing body "may not be held for its decision to undertake a project, it is liable for negligent execution" (346 U. S. 59); the dissent argued that, in shipping a dangerous article, the Government, like a private manufacturer, was obligated to ascertain its dangerous propensities and to give warning of the dangers, and that having failed to do so, it executed that phase of the project negligently (*id.*, 53, 55–6). The dissent *rejected* the argument, *which really underlies appellant's contention here*, that application of the exception should be governed "not by whether an act was discretionary but by who exercised the discretion" (346 U. S. at 58, fn. 12). Moreover, the dissent fully accepted the view that,

There has been no decision by the Supreme Court since *Dalehite* which has, in any way, modified these views as to the nature or scope of the discretionary function exception. *Indian Towing Co.* v. *United States,* 350 U. S. 61, involving the negligent operation of a lighthouse, did not as the Court itself noted (350 U. S. at 64), relate to this aspect of § 2680 (a), but instead dealt with the interpretation of § 2674 of the Act.[33] *United States* v. *Union Trust Co.,* 350 U. S. 907, involving the negligent operation of an airport control tower, summarily affirmed the decision below (221 F. 2d 62) on the authority of *Indian Towing.*[34]

"The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official" (id., p. 60), citing such cases as *Gregoire* v. *Biddle* and *Spalding* v. *Vilas*, the doctrine of which we have discussed above, pp. 28–31.

[33] *Indian Towing* was a claim based upon alleged negligence of the Coast Guard in failing to keep the light burning in a lighthouse. Moving to dismiss the complaint, the Government argued that its liability under the Tort Claims Act was limited to that of "a private individual under like circumstances" (§ 2674), that there could be no liability of a private individual in like circumstances because the operation of lighthouses has always been, since the beginning of our country, an exclusively and uniquely governmental activity, just as is the maintenance of the army. Dividing 5 to 4, the Supreme Court rejected that argument, and held the Government liable on the theory that one who undertakes to warn another of danger and thereby induces reliance must perform his Good Samaritan task carefully. Insofar as *Dalehite* dealt with § 2674 (see 346 U. S. at 42–44), it was said to be distinguishable. 350 U. S. at 69.

[34] In *Union Trust*, the Government argued similarly that the operation of airport control towers to warn and regulate interstate air commerce was a uniquely governmental activity, without private counterpart, hence that the claim failed to meet the

Insofar as these two cases refer to the operational-level-planning-level dichotomy, we discuss them further below, pp. 52–57. In *Hatahley* v. *United States,* 351 U. S. 173, 181, involving the destruction of Navajo Indian horses by federal employees, the Supreme Court stated that, "We are not here concerned with any problem of a 'discretionary function' under the Act, [for which] see *Dalehite* v. *United States.*"

The lower courts, on the other hand, both before and since *Dalehite* have applied the exception generally in accordance with the principles stated in the *Dalehite* decision. A brief description of some of these cases will serve to illustrate the types of claim under the Act which have been held barred by the exception. We have set out these cases in the margin below.[35] It will be observed that these cases

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analogous private liability test of § 2674. The Court of Appeals found comparable private activity in privately operated towers (221 F. 2d at 74). In affirming *per curiam* on the authority of *Indian Towing* (without arguments or briefs on the merits), the Supreme Court made no mention of the discretionary function exception aspect of that case.

[35] First we mention illustrative cases which may be analogized to the non-Tort Act public works cases, and, as to those, of particular interest in the light of the facts in the present suit are a group of decisions which were briefly explained and approved in the *Dalehite* opinion itself (346 U. S. at pp. 36–37, fn. 32). These include *Boyce* v. *United States*, 93 F. Supp. 866 (S. D. Ia.), where, in the words of the Supreme Court (346 U. S. at 36–37), the plaintiff "charged that he had suffered damage by virtue of certain governmentally-conducted blasting operations. The United States, by way of affirmative defense, showed that the blasting had been conducted pursuant to detailed plans and specifications drawn by the Chief of Engineers who, in turn, had been specifically delegated 'discretion of the broadest character' to draft a plan for deepening the Mississippi River channel. The exception was applied."

fall broadly within the two categories of non-Tort Act cases we have discussed above (*supra,* pp. 26 *et seq.*), *i. e.,* cases involving public works and cases involving official conduct, not ministerial in character, where it is the duty of the officer to exercise his judgment.

In *Olson* v. *United States*, 93 F. Supp. 150 (D. C. N. D.), plaintiff's livestock were lost when the flood gates of a dam were opened; the exception was held applicable, and the Supreme Court (346 U. S. at 37) approvingly noted the holding below that "*when* flood waters are to be released and *how much* water is to be released certainly calls for the exercise of judgment" (emphasis in original). Similarly, a claim based upon the release of flood waters at Bonneville Dam was held barred by the exception in *Lauterbach* v. *United States*, 95 F. Supp. 479 (W. D. Wash.). See also, *Coates* v. *United States*, 181 F. 2d 861 (C. A. 8) (§ 2680 bars claim for damages resulting from negligently changing the course of a river); *North* v. *United States*, 94 F. Supp. 824 (D. Utah) (§ 2680 bars claim for damages resulting from a government dam raising the level of ground water); *Toledo* v. *United States*, 95 F. Supp. 838 (D. P. R.) (§ 2680 bars a claim based upon the falling of a rotted tree maintained for experimental purposes).

Other typical Tort Act cases roughly within the public works or public project category are *Sickman* v. *United States*, 184 F. 2d 616 (C. A. 7), certiorari denied, 341 U. S. 939, where the exception was held applicable to a claim based upon depredations by migratory waterfowl permitted to congregate in vast numbers in a sanctuary maintained under authority of the Migratory Bird Treaty Act, 15 U. S. C. 703; *Harris* v. *United States*, 205 F. 2d 765 (C. A. 10), where the decision of the Fish and Wildlife Service and of the Corps of Engineers to destroy a willow growth on Government lands by the use of a herbicide sprayed from an airplane was held to involve a discretionary function; and, in *United States* v. *Ure*, 225 F. 2d 709, 711 (C. A. 9), this Court held the exception applicable to the decision as to how to construct a canal.

Cases illustrating the other category, that is, the situation in which it was the duty of the official to exercise his judgment in performing the functions of his office, include *Denny* v. *United*

B. Appellant's claim arises out of the performance of discretionary functions and duties

Under either aspect of the rule discussed above, the discretionary function principle bars recovery in this case. Appellant's claim is based upon damage allegedly caused by blast waves resulting from the detonations of atomic devices. While appellant does not challenge, as indeed it cannot, that the decision initiating the nuclear test program, and that the decision

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States, 171 F. 2d 365 (C. A. 5), certiorari denied, 337 U. S. 919, where a claim based upon the failure of the Army to furnish medical and hospital services to a soldier's wife was rejected on the ground that the pertinent statute (10 U. S. C. 96) and regulation provided for such services "whenever practicable"; *Chournos* v. *United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977, where the Government was held not liable for the action of a range manager in denying a grazing permit for public lands; *Matveychuk* v. *United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845, where the exception was help applicable to a suit for losses resulting from an Office of Price Administration denial of a rent increase; *Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896, which rejected liability for damages caused by the allegedly improper conduct of a Securities and Exchange Commission investigation; *Smart* v. *United States*, 207 F. 2d 841 (C. A. 10), where the determination of hospital authorities, in accordance with Veterans Administration regulations, to release an incompetent mental patient for a trial visit was characterized as the exercise of discretion; *Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270 (C. A. 5), denying liability for the failure of Federal employees to prevent a theft by not properly supervising migratory Mexican workers at a reception camp under the Migrant Labor Agreement; *Morton* v. *United States*, 228 F. 2d 431 (C. A. D. C.), where the discretionary function exception was held applicable to the determination of Federal officials that a prisoner should be transferred from the District of Columbia jail to the United States Medical Center in Missouri.

selecting the Nevada Proving Grounds as the site of the tests, were discretionary acts, appellant argues that there was negligence in the manner in which the tests were conducted. Specifically, appellant argues negligence in firing the shots without determining "if the existing weather conditions 'were, in fact, acceptable' " (App. Br. 12), and, particularizing further, appellant contends Dr. Cox (who did not make the final decision as to whether to fire the shots) was negligent in placing the eight available microbaragraphs in the direction of the more populated areas and cities, rather than to the north near its ranch (App. Br. 12, 23).[36]

1. *There was no deviation from the approved plan*

While conceding that when the Government, "at planning level, determines programs, plans, specifications or schedules of operations, it is exercising immune discretion and any activity pursuant to such plan does not give liability under the Act" (App. Br. 21), appellant argues that Dr. Cox "deviated from the direction and plan at planning level" (App. Br. 23). *But the record does not establish any such deviation.* On the contrary, the record plainly establishes that the detailed procedures of conducting the tests, including all preliminary functions, had been worked out in advance and had been approved and adopted by the highest executive authority. Viewed as a whole,

[36]Although appellant describes Dr. Cox's primary job as testing and calculating "weather conditions" (App. Br. 22–23), the fact is that his function was to predict, on the basis of weather forecasts and other data, what the blast pressures might be at great distances (R. 249).

the approval of the test series and of all its complicated preliminary preparations, was the equivalent of the adoption of a plan for a public works and was equally discretionary. It was the very kind of "authorized activity" or "federal project" (*Dalehite,* 346 U. S. at 29, 27) which Congress had in mind as being covered by the exception.

Apart from its bald assertion, appellant has failed to show that there was any departure from the approved plan. In that connection it should be borne in mind that the evidence must be viewed "in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence *compelled* a finding in his favor" (*Anderson* v. *Federal Cartridge Corp.,* 156 F. 2d 681, 684 (C. A. 8), emphasis added; cf. *Glens Falls Indemnity Co.* v. *United States,* 229 F. 2d 370, 373 (C. A. 9)). Here, the program for the 1951 atomic experiments, which was approved by top officials, set forth all of the significant elements with reference to the conduct of the experiments. The determination at the highest level was not merely a decision that atomic devices should be fired in Nevada, but embraced such factors as the number of nuclear devices to be detonated, the approximate dates of the detonations, the amount of fissionable material to be used, the yield (in terms of energy) to be produced, etc. *Supra,* pp. 6–11. These factors, plus the knowledge accumulated from past experience that, although no serious hazard was involved (R. 214), some minor damage might occur beyond the test site, where carefully weighed and con-

sidered by our country's foremost nuclear experts, and, with their views and recommendations in mind, the program was authorized and approved by the Atomic Energy Commission, by special committees established by Congress for just that purpose, by top military officials, by the Secretaries of State and Defense, by the National Security Council, and by the President himself (*supra,* pp. 6–11).

After the detailed program and schedule received these approvals, the Test Organization, which had the responsibility of conducting the tests and which was headed by Carrol L. Tyler as Test Manager, prepared an even more particularized proposal setting forth precisely the manner in which the tests would be conducted, with due regard to the safety criteria which had been set up, indicating the technical procedures to be followed, fixing the exact dates and times of the detonations, and specifying a set of experiments which would be done on the detonations (R. 177). This particularized proposal, too, was submitted to the Atomic Energy Commission, and only after its approval could the Test Organization proceed to execute them (*ibid.*).

With this last approval obtained, the approved details were then passed on to various components of the Test Organization. A memorandum of directions and instructions was issued which outlined the administrative method to be followed, specified the communications channels, fixed the sequence of firing the test devices, established the date and time of firing, "outlined the specific procedures for firing each shot *and*

provided a detailed schedule of functions to be performed during specified periods prior to, and following each shot" (R. 233). The preliminary high explosive shots, supervised and recorded by Dr. Cox, upon which appellant bases its claim of negligence, certainly must have been included in the functions planned to be performed prior to each shot. The placing of the microbaragraphs and other equipment at different spots many miles from the test site, the assignment and transportation of personnel to these distant locations to operate and read these instruments, the establishment of communication channels they used to rush the readings back to the test site, and the numerous related problems connected with Dr. Cox's work—which was but one phase of the entire operation preliminary to firing the atomic shots—obviously had to be planned and set up in advance and necessarily were included within the "specific procedures for firing each shot" and the "detailed schedule of functions to be performed during specified periods prior to" each shot (R. 233, 300–301). Not only does the record fail to show any deviation from the procedures and preliminary experiments which were detailed in advance, but the court below specifically noted in his findings of fact that the Test Manager—to whom the Atomic Energy Commission had delegated the overall authority to conduct the tests (R. 26)—as well as his board of experts *were fully informed as to the location of the microbaragraphs* (R. 28).

Thus it is clear that the case falls squarely within the confines of the *Dalehite* decision. As in that case,

the entire program—the plan, specifications and schedule of operations—were approved at the highest level, and those who carried out the program adhered to its mandate. "It necessarily follows that acts of subordinates [if Dr. Cox can be viewed as a subordinate] in carrying out the operations of government in accordance with official directions cannot be actionable" (346 U. S. at 36).

2. The decisions of the Test Manager and of Dr. Cox, on which appellant's claim is based, were made in the exercise of immune discretion

Even if it be assumed, contrary to the evidence, that the precise procedures used in the preliminary tests were not specified in the approved plan, appellant's claim must fail for there can be little question that the acts upon which the claim is based were performed in the exercise of immune discretion (see *supra,* pp. 28 *et seq.*).

a. In arguing that there was negligence in firing the atomic shots without determining if weather conditions were acceptable (App. Br. 12), appellant is really attacking the decision and judgment of the Test Manager. For the duty of deciding that weather conditions were optimal for public safety was not the duty of Dr. Cox; that decision had to be, and was, made by the Test Manager in the exercise of his judgment. The Test Manager alone had the authority and the responsibility of making that determination. The record and the findings of the court below permit no other conclusion (R. 26, 28, 181, 294) and even appellant concedes that there was discretion to delay

the firing if it was decided that weather and atmospheric conditions were not suitable (App. Br. 7).[37]

The Atomic Energy Commission delegated to the Test Manager—the official directing the entire operation—the duty of fixing the precise moment when each shot was to be fired based on *his* judgment that weather conditions were most adaptable in the circumstances. It assigned to him a panel of the country's foremost scientists, including Dr. Cox, to supervise the gathering and the evaluation of the varied mass of scientific data which he needed to make that determination, but their function was primarily an advisory one. In making the decision, the Test Man-

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[37] Appellant's assertion that the discretionary authority of the Test Manager "was no greater than that of an Army truck driver" (App. Br. 22) is little short of grotesque. And the assertion (*ibid.*) that General Fields so testified is not true; indeed, his testimony was quite the reverse. While General Fields testified that the Test Manager had no authority to deviate from the plan approved by the President and AEC, he went on to say: "I don't consider myself competent to say that the Test Manager is or is not analogous legally to an Army truck driver although *I have never considered that the Test Manager could be construed to be a truck driver in that sense*" (R. 236). His testimony was that the Atomic Energy Commission had "vested in Tyler [the Test Manager] over-all responsibility for the operation * * *. Tyler's responsibilities under the above authority included, but were not limited to: the security of the test operation; radiological safety, both operational and public in the local area; public information; obtaining military support and the conduct of observer programs. * * * [He was also given] overriding operational authority for the purpose of making minor changes necessitated by operational conditions" (R. 232). It should be noted, however, that even an Army driver may, in an unusual situation, be vested with discretionary authority, *e. g.*, to violate speed laws. Cf. *State* v. *Burton*, 41 R. I. 303, 103 Atl. 962.

ager had the benefit of their recommendation, *but the ultimate decision and responsibility was his alone.* As Dr. Cox testified, "I advise the Test Manager, and then it is his decision as to whether we go ahead and shoot, or whether we postpone" (R. 294; see also R. 181). That decision, as the record plainly demonstrates, was "the product of an exercise of judgment, requiring consideration of a vast spectrum of factors" (cf. *Dalehite,* 346 U. S. at 40); it was the Test Manager's "judgment of the best course" (*id.*, at 34). It was precisely the type of act which traditionally has been held to be discretionary. Where the claim rests upon official acts "in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution." *Louisiana* v. *McAdoo,* 234 U. S. 627, 633.

Not only does the law preclude a suit attacking "the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself" (cf. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 325), but it also precludes examination, at the suit of a private person, into the factors which the official considered and weighed in reaching his decision. The courts simply "will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination" (cf. *DeCambra* v. *Rogers,* 189 U. S. 119, 122; *Wann* v. *Ickes,* 92 F. 2d 215, 217 (C. A. D. C.)). If the rule were otherwise, the protection given

to discretionary acts would be nullified, for the discretionary determination could then be attacked indirectly under the guise of an attack on those subordinate officials who gather or furnish the information needed by the officer who makes the discretionary decision. The short of it is that there can be no inquiry behind the discretionary determination, whether that inquiry be addressed to motive or to the facts on which the determination was based.

It follows, first, that since the Atomic Energy Commission delegated to the Test Manager the responsibility and duty of exercising his judgment as to when conditions were most suitable for firing the particular shots, his determination in that regard was an immune discretionary act, and second, that no inquiry may be made at the instance of appellant as to what factors the Test Manager considered in making his determination, or as to what factors he ignored, or as to what advice or recommendations he received or credited, or as to how he reached his decision. Since his was a discretionary act, no recovery would be cognizable under the Tort Claims Act even if appellant had established (which of course is certainly not the case) that the Test Manager had negligently ignored either the pre-shot data supplied by Dr. Cox or the recommendations of some other member of the panel of experts. For, obviously, the discretionary function exception can come into play only when there is alleged negligence in the exercise of discretion (*Dalehite,* 346 U. S. at 33).

The information furnished by Dr. Cox, which appellant argues was negligently gathered, was but one

of many facts considered by the Test Manager in reaching his decision that conditions were suitable for firing the shots. Clearly the rule which precludes inquiry into the facts considered by the Test Manager in reaching his immune decision similarly precludes inquiry into whether those facts were prepared carefully. Cf. *DeCambra* v. *Rogers, supra; Wann* v. *Ickes, supra.* Since appellant cannot inquire as to what weight the Test Manager gave to the data furnished by Dr. Cox, no inquiry can be made into the nature of that data and the manner of its preparation.

b. Nevertheless, even if appellant is permitted to go behind the Test Manager's determination that "the testing was taking place under conditions optimal for public safety under all the circumstances" (R. 28), and if appellant is permitted to inquire into and to attack the manner in which Dr. Cox's data was obtained, the discretionary function exception still bars recovery in this case. For, Dr. Cox's role was not a ministerial one but in itself required the exercise of judgment and discretion. As an eminent scientist in the field of blast effects, Dr. Cox was a member of the panel of experts (R. 180–1); he was engaged in a consultant and advisory capacity (R. 293); his function was to advise the Test Manager with respect to the probable blast pressures in particular areas (R. 293–4). Clearly, his assignment was not a menial one. The Test Organization was relying upon him to exercise his best judgment in predicting the probable pressures in the inhabited areas.

As we have already indicated (*supra,* pp. 45–46), the record establishes that the details of his pre-

atomic-shot functions were submitted to and were approved by the Atomic Energy Commission. But if we ignore that fact, it is evident that Dr. Cox was given discretion to conduct his tests in the manner he believed best suited to obtain the information desired. It was because of his special expertise in this field that he was present. His work required the use of microbaragraphs, and there were only eight such instruments available in the country. In explaining the placing of those instruments at different sites, Dr. Cox testified, "I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. * * * In each instance they were [placed] in communities" (R. 294, 296). This of course was an exercise of judgment, one which involved considerations of peculiar interest to the public. It was not an exercise of judgment akin to that of an Army truck driver in maneuvering his vehicle through traffic. Rather, it was an act of judgment, in effect a policy decision, by a public official as to what is the "best course" (cf. 346 U. S. 34) to assure maximum public safety in view of the limited facilities available. As such it falls directly within the exclusion of Section 2680 (a).

C. Application of the discretionary function exception does not depend on the distinction between operational level and planning level conduct

To avoid the reach of the discretionary function exception, appellant argues, first, that the exception does not apply to so-called operational level conduct, and, second, that the duties of the Test Manager and of

Dr. Cox were operational level duties (App. Br. 18–24). We seriously question the soundness of the first proposition, and we believe that the record controverts the second.

1. *The discretionary function exception is not limited only to conduct at the planning level*

A few recent decisions have seized upon the "operational level" versus "planning level" dichotomy as a quick and easy formula for solving the frequently difficult problem of application of the discretionary function exception.[38] These decisions drastically limit the scope of the coverage of the exception, apparently holding that discretionary acts of officials at the planning level are immune but discretionary acts of operational level officials are not. In the words of the dissenting Justices in *Dalehite,* who, like the majority in that case, rejected this view, the application of the exception would be determined "not by whether an act was discretionary but by who exercised the discretion" (346 U. S. at 58, fn. 12). This standard, based solely on the *echelon* of the official rather than on the *discretionary nature* of his conduct, has no justification whatever in the language of the Tort Claims Act. It has no warrant in the legislative history of § 2680 (a). It is directly contradicted by the pre-Tort Claims Act cases from which the meaning of the discretionary function phrase is derived. Moreover, far from clarifying the already difficult problem of application of

[38] See *Fair* v. *United States*, 234 F. 2d 288 (C. A. 5); *Dahlstrom* v. *United States*, 228 F. 2d 819 (C. A. 8); *United States* v. *Union Trust Co.*, 221 F. 2d 62, aff'd, 350 U. S. 907.

the exception, injecting this standard would in a great many cases compound that difficulty with additional confusion and vagueness because, necessarily, it immediately creates the further problem of setting up criteria for determining what activity is operational level and what is not.

To read § 2680 (a) with the sharp qualification this standard imposes requires the insertion of words which simply do not appear there, and their insertion is a legislative, not a judicial, function.[39] The plain meaning of the section, as it appears in the statute without the words appellant would interpolate, indicates a Congressional purpose to exclude claims based upon discretionary conduct without regard to the level of the officer or agency involved. It was the nature of the act, not level of the actor, which Congress was concerned about in adopting the exclusion. There is not the slightest intimation in the Congressional Committee reports explaining § 2680 (a) that only high level policy planning was to be immune (see the Committees' explanation set out in *Dalehite,* 346 U. S. 29–30 at fn. 21).

We have already shown that the traditional pre-Tort Claims Act discretionary function cases, from which the words of the exception derive their mean-

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[39] Appellant would read § 2680 (a) this way: "The provisions of * * * section 1346 (b) * * * shall not apply to—(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government [*acting at a planning level*], whether or not the discretion involved be abused." But Congress did not insert the italicized words appellant reads into the section.

ing, do not draw any definitive distinction between discretionary acts at the planning level and those at the operational level (*supra,* pp. 28–34). We know, also, that there are many decisions under the Tort Claims Act which, consistent with the plain meaning of the exception, have held truly discretionary acts to be within the exception even if they are at an operational level.[40] On the other hand, the cases which appellant points to as adopting the distinction (fn. 38, *supra,* p. 53) make no analysis of the problems and offer no rationale—based on the language, purpose, or history of the statute—for reading the distinction into the Act.

The most recent case, *Fair* v. *United States, supra,* relies on the Supreme Court decisions in *Dalehite, Indian Towing* and *Union Trust.* We submit, however, that a careful reading of those three cases will disclose that the Supreme Court actually has never passed on the point. In *Dalehite,* the Supreme Court did *not* limit the exception merely to high level policy judgment and deny it to discretionary acts at the so-called operational level. On the contrary, after hold-

[40] Thus, it would be ludicrous to say that policy-forming determinations were involved in *Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5) involving the failure of law enforcement officers to prevent a theft; or in *Chournos* v. *United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977, involving the denial of a grazing permit; or in *Matveychuk* v. *United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845, involving an OPA denial of a rent increase; or in *Denny* v. *United States*, 171 F. 2d 365 (C. A. 5), certiorari denied, 337 U. S. 919, involving the refusal to admit a soldier's wife to a hospital; or in *Morton* v. *United States*, 228 F. 2d 431 (C. A. D. C.), involving the manner in which a particular prisoner is confined or fed.

ing that the words of the exception cover "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33; emphasis added), the Court set out verbatim the plaintiffs argument on the point and then declined to accept the limitation, saying that, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35).[41]

The *Indian Towing* decision, although it makes passing reference to *Dalehite's* mention of operational level conduct (350 U. S. at 64, 68), does not itself hold that § 2680 (a) is confined to discretion at the planning level. The discretionary function exception

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[41] Insofar as the Supreme Court held in *Dalehite* that claims arising from alleged Coast Guard negligence (in failing to enforce existing safety regulations, in failing to supervise the storage of the FGAN, and in failing to put out the fire) were not actionable, the Court was passing upon activities which obviously were operational level. These failures were not the result of "policy-forming" decisions, as was mistakenly declared by the lower court in *United States* v. *Union Trust Co.*, 221 F. 2d 62, 77 (C. A. D. C.).

The major portion of the *Dalehite* decision dealt with the public works aspect of the discretionary function exception, *i. e.*, the traditional exemption from liability which governing bodies have in connection with the planning of public projects, and it was in that context that the Court said, "The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program" (346 U. S. at 42). There was no suggestion that this distinction was to be injected in situations governed by the other line of cases we discussed above (*supra*, pp. 28–34), which the dissent alluded to when it said that, "The exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official" (346 U. S. at 60).

was not involved in the *Indian Towing* decision, and the Court so stated, 350 U. S. at 64. Nor is the Supreme Court's *per curiam* affirmance of the *Union Trust* case (see above, pp. 39–40) indicative of its acceptance of the operational level v. planning level distinction. The main thrust of the Government's argument in *Union Trust* dealt with the uniquely governmental nature of the activity involved and with the lack of private analogy required by § 2674 of the Act. This was the only subject of the *Indian Towing* decision. In affirming *Union Trust* summarily (without briefs or argument on the merits), the Supreme Court cited *Indian Towing* alone, thus indicating the ground of the affirmance, *viz.,* rejection of the uniquely governmental function argument.

We think it evident, therefore, that the Supreme Court has not held that the official's level or echelon determines the applicability of the discretionary function exception. We respectfully suggest that the lower courts which have read the Supreme Court's decisions otherwise have fallen into error. We submit that the determinative factor in the application of the exception is not the level of the official but is the discretionary nature of the act itself—whether "discretionary" be taken in the special sense it has acquired in the American law of public liability or in its more general connotation of "involving judgment."

2. Neither the Test Manager nor Dr. Cox were operational level employees

The functions of both the Test Manager and of Dr. Cox have already been described at length (*supra,*

pp. 9–11, 14–16, 45–49). The Test Manager was the official who headed the Test Organization. He was in full charge of the entire program and had several thousand persons under his direction (see fn. 3, *supra,* p. 4). The Atomic Energy Commission had vested him with "over-all responsibility" for the conduct of the tests (R. 232). The Test Organization, which he headed, planned and prepared the particularized proposal setting forth the precise procedures, the administrative methods, the schedule of functions, etc., which were to be followed in conducting the experiments (R. 233, 177). Manifestly, his position was at a planning level. The record is clear that the detailed plans he and his organization prepared were submitted to and were approved by the Atomic Energy Commission (R. 177).

Dr. Cox, on the other hand, was the planning official within the more limited sphere of his work. It was he who had devised the pre-atomic-shot experiments. It was he who had planned and who later supervised their execution. It was he who had determined where the microbaragraphs were to be placed. While he worked under and subject to the direction of the Test Manager, it is plain, as we have already shown (*supra,* pp. 45–46), that the plan, the schedule, and the function of his experiments were also approved by the Commission before the test series were actually conducted.

II. The district court's findings that appellant failed to establish either that the United States was negligent or that the atomic detonations were the proximate cause of the damage to appellant's property were not clearly erroneous

The District Court found that, "Upon the evidence before it, this Court cannot find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation, or that the atomic detonations were the proximate cause of the damage to plaintiff's property" (R. 29). To the contrary, the Court found that "every precaution for the public's safety was exercised, commensurate with the task to be performed, and the equipment and scientific knowledge available" (R. 28–29), and that, "In approving the detonation at the particular times and under the particular weather conditions then prevailing, the Test Manager determined that the testing was taking place under conditions optimal for the public safety under all the circumstances" (R. 28). These findings, which appellant is here challenging, may not, under Rule 52 (a) of the Federal Rules of Civil Procedure, be set aside unless clearly erroneous.

Under that rule, the findings of the trial court may not be disturbed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Oregon Medical Society,* 343 U. S. 326, 339; *United States* v. *Gypsum Co.,* 333 U. S. 364, 395. As this Court said in *Glens Falls Indemnity Co.* v. *United States,* 229 F. 2d 370, 373, "It is not the function of this court to retry cases on appeal." If the evidence

before the trial court would support a finding either way, and the trial judge has decided it to weigh more heavily for one of the parties, the appellate court may not upset that determination because "such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342. In reviewing the record the appellate court must approach the evidence in the light most favorable to the prevailing party, for there is a strong presumption in favor of the trial court's findings. *Glens Falls Indemnity Co.* v. *United States, supra; Anderson* v. *Federal Cartridge Corp.*, 156 F. 2d 681, 684 (C. A. 8). Nor is the reviewing court free to substitute its judgment of the facts for that of the trial court. As stated by the Supreme Court, "It is not enough that we might give the facts another construction, [or] resolve the ambiguities differently * * *. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States* v. *Real Estate Boards*, 339 U. S. 485, 495–496.[42]

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[42] Since the question of negligence is normally a question of fact to be determined by the trier of facts, *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Chesapeake & O. Ry. Co.* v. *Coffey*, 37 F. 2d 320, 324 (C. A. 4)), the trial court's determination of negligence vel non is subject to the same rule and will not be disturbed unless it is "clearly erroneous." Suits under the Tort Claims Act are tried by the court without a jury (28 U. S. C. 2402); the findings at bar therefore are governed by these same principles. *United States* v. *Fotopulos*, 180 F. 2d 631, 634 (C. A. 9); *United States* v. *Hill Lines, Inc.*, 175 F. 2d 770 (C. A. 5); *Wasserman* v. *Perugini*, 173 F. 2d 305 (C. A. 2).

It follows from these principles that the judgment below may not be overturned if the trial judge's findings are substantially supported by the evidence, have a rational basis, and are responsive to the issues and the applicable law. To upset the findings it will not suffice for appellant to show merely that the evidence would support an alternative or contradictory view; rather, it has the burden of establishing convincingly that the trial judge's findings reflect a mistaken view or misconception of the evidence and that the evidence unquestionably compels contradictory findings. Appellant cannot sustain that burden here. The record in this case amply supports the findings which the trial judge made.

1. In attacking the finding of no negligence, appellant relies solely and entirely on the fact that Dr. Cox did not place a microbaragraph "to the north" of the test site to graph conditions there (App. Br. 8). But, in the first place, it is important to observe that Dr. Cox actually gave several predictions of the probable blast pressures before the firing of the shots, only one of which was based on data obtained from the microbaragraphs (R. 256–259). Thus, he gave blast pressure predictions based upon the weather data gathered by the network of weather stations, and based upon the weather prediction. He also gave blast pressure predictions based upon weather balloon soundings. Appellant completely ignores these predictions by Dr. Cox and, significantly, the record does not reveal that in making these predictions no heed was paid to weather conditions to the north of the test site.

Second, the evidence shows that the placing of the microbaragraphs, which Dr. Cox used in connection with still another series of predictions, was determined primarily by two considerations: (i) the limited number of such instrument available, and (ii) the desire to obtain maximum protection for the greatest number of people. The uncontradicted testimony was that at the time of the 1951 test series there were only eight microbaragraphs available in this country (R. 273, 294). Dr. Cox's testimony warrants being repeated: "I borrowed all eight, and I needed to use discretion in placing the eight instruments to the best of my ability to give maximum protection to the greatest number of people. I was not able, with the eight instruments, to place an instrument at every farm house [or] ranch, that might be within the zone of receiving these pressures. I had to decide where I would place them to get the maximum protection for the maximum number of people" (R. 294; and see R. 273). With that objective in mind, none of the microbaragraphs was placed within the proving ground itself; instead, each was placed within a community to the east, south and west of the proving ground (R. 295–296).

It should be noted also that Dr. Cox testified that he actually does not need a station to forecast the blast pressure focuses because they could be predicted on the basis of mathematical computations from the known weather data and from the known laws of physics relating to sound propagation. "I can compute this from the weather data," Dr. Cox said, "but

it is very nice to confirm it with instruments. Complexity and size of these instruments nearly prohibits the moving of them, so before the test series begins I have to locate my stations. The weather puts these focal points where it desires; *if a focus hits my station I have data; if it doesn't, I have no data*" (R. 300–301).[43]

This evidence, plus Dr. Cox's testimony that it was his function to predict blast pressures in *inhabited* localities (R. 249), meaning communities with numbers of people rather than isolated ranches or farmhouses (R. 294), plus his testimony that because of the generally prevailing westerly winds the blast pressures in the area ranging from northeast to southeast of the test site (where most of the available microbaragraphs were in fact placed) are always larger than in other directions (R. 270), clearly demonstrates that the district judge's finding is fully supported by the record, even without reference to the other evidence relating to the elaborate precautions taken to assure public safety. Indeed, it would appear—in view of the few microbaragraphs available and in view of the paramount desire to protect the greatest number of people possible—that Dr. Cox would have been deficient in his duty if, instead of placing the microbaragraphs in the populated com-

[43] This shows that even if Dr. Cox had located a microbaragraph near appellant's ranch, as appellant claims should have been done, it is entirely speculative whether it would have recorded any data to indicate a focal point there.

munities, he had placed one of them in the sparsely inhabited area of appellant's 350,000 acre ranch.[44]

2. The testimony as to the cause of the cracks in the plaster walls of appellant's buildings was conflicting and contradictory. A witness for the Government who examined the cracks, and who was qualified as an experienced architect and construction engineer (R. 309), described them as "typical average plaster cracks" (R. 311). Some of the cracks were of the kind "that occurs only when there is a poor mix of plaster or a poor adhesion to the rock lath" (R. 312). His opinion as an expert, after studying the shape of the cracks and the construction of the building, was that the cracks resulted from settlement of the building and from changes in temperature (which causes plaster to expand and contract) (R. 317–319). He indicated that the cracks were such as would appear in time in every building of like construction, even very well-built ones (R. 319–320). Appellant, on the other hand, introduced testimony controverting this (*supra*, p. 17). The district judge, who saw and heard the

[44] The decision of the Test Manager to detonate the shots was made with full knowledge of the limitations with regard to the number of microbaragraphs available and the places where they were stationed (R. 28). The Test Manager, who alone had the responsibility of final decision, had to work with the knowledge and facilities available to him. It was for the Test Manager to determine whether or not the information furnished was sufficient, after being advised by Dr. Cox and the other experts on his advisory panel, to keep any danger to the public at large to a minimum. Thus, appellant's emphasis on the conduct of Dr. Cox is misplaced. It is the Test Manager who had the responsibility for the acts complained of, and his conduct was discretionary.

witnesses and who had the opportunity of observing their demeanor and of judging their credibility, resolved this issue against appellant. It cannot be said, therefore, on the basis of the record before the court and in conformance with the requirements of Rule 52 (a), that his finding as to proximate cause was clearly erroneous.

III. The doctrine of *res ipsa loquitur* does not apply

Appellant's argument concerning the *res ipsa loquitur* doctrine (App. Br. 16–17) is really an additional attack on the findings of fact presented in another manner. However, the conditions necessary for the application of the doctrine are not present in this case. Moreover, whatever procedural benefits flow from application of the doctrine were obtained by appellant below.

1. *Res ipsa loquitur* is simply a rule of circumstantial evidence. It permits the trier of the facts to make an inference of negligence in certain situations where the plaintiff has failed or is unable to establish negligence by direct proof. See, *United States* v. *Coffrey,* 233 F. 2d 41 (C. A. 9); *Prosser on Torts* (2d Ed.), pp. 199 *et seq.* To invoke the doctrine the plaintiff must prove the existence of two crucial facts: (1) that the defendant had exclusive control of the instrumentality or thing causing the damage, and (2) that the occurrence was of such a nature as ordinarily would not have happened in the absence of negligence by the defendant.[45] *Ibid.; Hospital As-*

[45] A third requirement is that the plaintiff himself be free of any conduct contributing to the accident. See *United States* v. *Coffey*, *supra; Prosser on Torts*, *supra.*

sociation v. *Gaffney,* 64 Nev. 225, 180 P. 2d 594; *Escola* v. *Coca-Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 456; 38 Am. Jur. 989.

Concerning the first of these requirements: There was conflicting evidence before the trial court as to what the "thing" was that caused the cracks in the plaster walls of the buildings. Appellant had introduced testimony in support of its contention that the cracks were caused by the nuclear blasts. The Government countered with convincing testimony to the effect that the cracks were caused by settlement of the buildings, by temperature changes causing expansion and contraction, etc. (See *supra,* p. 64). Faced with this conflicting evidence, the District Court properly could not, with the degree of certainty required in a typical *res ipsa loquitur* situation,[46] point to the "thing" which had caused the cracks in the building (R. 18, fn. 1), nor could it, therefore, make a finding as to exclusive control. Appellant had the burden of establishing this fact as a *sine qua non* to invoking *res ipsa loquitur.* It failed to meet that burden.

Concerning the second requirement: The District Court correctly observed that cracks in plaster may be caused by ordinary occurrences completely unrelated to negligence of the defendant in the course

[46] For example, there could be no doubt that the leg-burn complained of in *Hospital Association* v. *Gaffney, supra,* was caused by a hot water bottle in the plaintiff's bed; or that the hand injuries sustained by the plaintiff in *Escola* v. *Coca Cola Bottling Co. of Fresno, supra,* were caused by an exploding pop bottle held by the plaintiff.

of detonating the atomic devices. It is a matter of common knowledge and experience, as the evidence showed, that cracks in plaster walls usually result from settling of the building, from temperature changes, from "curing" of the plaster, from an improper mix of plaster, from a poor adhesion of the plaster, from earth temblors, etc. Manifestly, where common experience establishes so many reasonable and probable explanations for the occurrence apart from negligence the case is not an appropriate one for application of the *res ipsa loquitur* doctrine.

2. In any event, the effect of the *res ipsa loquitur* rule is only that the facts of the accident themselves constitute a *prima facie* case which will permit an inference of negligence *but which do not compel it. Sweeney* v. *Erving,* 228 U. S. 233, 240; *Jesionowski* v. *Boston & Maine R. Co.,* 329 U. S. 452, 457. The doctrine is nothing more than a rule of necessity invoked, under prescribed conditions, to compel the defendant to come forward and explain his freedom from negligence. The rule, when properly resorted to, this Court said in *United States* v. *Ure,* 225 F. 2d 709, 711, "is predicated on negligence inferred from all the circumstances producing the loss, plus a failure of the party who controlled the destructive force to come forward with evidence peculiarly within his knowledge indicating that his negligence did not cause the loss." Even when the doctrine is applied, the plaintiff still has the "burden of proof as to negligence and proximate cause" (*United States* v. *Coffey,* 233 F. 2d 41, 44 (C. A. 9)), and it remains for the

trier of the facts to determine whether the preponderance of the evidence is with the plaintiff (*Sweeney* v. *Erving,* supra).

Actually appellant did obtain in the court below whatever significant procedural benefits are provided for under the *res ipsa loquitur* doctrine. Appellant's action was not dismissed for failure to establish a *prima facie* case. Judgment was not rendered for the United States at the close of appellant's case or on appellant's evidence alone. The Government did come forward with evidence explaining its freedom from negligence, and the court below, on the basis of the entire record, found that the inference of negligence (which the doctrine permits but does not compel) was not warranted. On the contrary, the court found affirmatively, on the basis of all the evidence, that every reasonable precaution for the public's safety was exercised and that no negligence was present.

IV. The Tort Claims Act does not permit recovery on the theory of absolute liability

1. "Count Three" of appellant's complaint (R. 5–6) asserts liability on the basis of absolute liability. The Tort Claims Act, however, permits liability only where there has been a "negligent or wrongful act or omission" of a federal employee, 28 U. S. C. 1346 (b). Recovery is permissible under the Act only under the doctrine of *respondeat superior,* which is a vicarious or derivative liability. See *United States* v. *Campbell,* 172 F. 2d 500, 503, certiorari denied, 337 U. S. 597. Absolute liability, based upon an ultrahazardous ac-

tivity, has no relationship to the *respondeat superior* doctrine. Liability for ultrahazardous activity is imposed not because an employee has committed a "negligent or wrongful act" for which he may be held liable to the injured person, but because the activity involved is one which, despite the exercise of all due care, poses a likelihood of injury. It is now settled beyond any question that the United States cannot be held liable under the Tort Claims Act on the theory of absolute liability for engaging in an ultrahazardous activity. Such is the decision of the Supreme Court (*Dalehite, supra,* 346 U. S. at 44–45), of this Court (*United States* v. *Ure,* 225 F. 2d 709, 711; *Rayonier Incorporated* v. *United States,* 225 F. 2d 642, 648), and of the Courts of Appeals in other Circuits (*United States* v. *Hull,* 195 F. 2d 64, 67 (C. A. 1); *Heale* v. *United States,* 207 F. 2d 414 (C. A. 3); *United States* v. *Inmon,* 205 F. 2d 681, 684 (C. A. 5); *Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10)).

2. Apparently as an after-thought, appellant suggests in this Court that although it used the term "absolute liability" below it really was pleading a trespass. This assertion is certainly not warranted by the language of appellant's complaint.[47] In any

[47] The complaint clearly set forth a claim based on absolute liability and not trespass. Thus, Count Three is entitled "Absolute Liability: Claim for Non-Tortious Damages" (R. 5). A claim of trespass would, of course, be a claim for tortious damages, and could not be described as "non-tortious." But the Count specifies further, in Paragraph IV, that in detonating the atomic devices the United States was engaged in an activity which "was ultra-hazardous and necessarily involved a risk of * * * damage to property * * *. That such damage could

event, this Court's decision in the *Ure* case, *supra,* is dispositive. A similar argument was made there and this Court said (225 F. 2d at 711): "For present purposes, as the judge recognized, this doctrine [of trespass] is indistinguishable from the principle of absolute liability enforced in cases involving the employment of an inherently dangerous agency. In light of the holding in *Dalehite* this ground, too, must be rejected in cases brought under the Tort Claims Act."

V. The district court was correct in holding that there was no taking of appellant's property in the constitutional sense

Appellant's argument that if there was no negligence involved then there was a taking of its property for public use, compensable under the Fifth Amendment, is necessarily predicated on its view that the cracks in the plaster walls were caused by the atomic detonations. The "taking" point, therefore, cannot be reached unless appellant convinces this Court that the trial judge's finding that the detonations were not the proximate cause of the cracks is clearly erroneous. But if the point is reached, the authorities disclose appellant's position to be without merit.

It is well established that proof of damage alone does not necessarily prove a taking. *Bedford* v. *United States,* 192 U. S. 217, 224. As the Supreme Court said in *United States* v. *Causby,* 328 U. S. 256, 266, "it is the character of the invasion, not the

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not have been eliminated by the exercise of utmost care upon the part of defendant" (R. 6). No allegation of trespass is set forth.

amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." Cf. *United States* v. *Caltex, Inc.,* 344 U. S. 149.

A single isolated destructive act, such as would normally be viewed as constituting a tort, done without a deliberate intent to assert or acquire a proprietary interest or dominion in the property affected, does not constitute a taking. *Bedford* v. *United States, supra; Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10). Thus, it has been held that the firing of guns over private property is not a taking of an easement unless the firing is repeated frequently. *Peabody* v. *United States,* 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327; *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 64 C. Cls. 572. Similarly, a single blasting operation by the United States causing damage to private property was held to be no more than a remediless tort in *Keokuk & Hamilton Bridge Co.* v. *United States,* 260 U. S. 125. Likewise, it has been held that *only* a permanent flooding, or intermittent but inevitably recurring flooding, of land constitutes a taking. Cf. *United States* v. *Kansas City Life Ins. Co.,* 339 U. S. 799, 809, fn. 8; *United States* v. *Dickinson,* 331 U. S. 745, 750–751; *North* v. *United States,* 94 F. Supp. 824 (D. Utah); *High Bridge Lumber Co.* v. *United States,* 69 Fed. 320, 326 (C. A. 6); *Matthews* v. *United States,* 87 C. Cls. 662, 720. Similarly, the airplane spraying of a herbicide on government property, which drifted onto and damaged private property dur-

ing a one week operation, was held not a taking. *Harris* v. *United States, supra.*[48]

Property is taken in the constitutional sense, the Supreme Court has said, "when inroads are made upon an owner's use of it to an extent that, as between private parties, a *servitude* has been acquired either by agreement or in the course of time." *United States* v. *Dickinson,* 331 U. S. 745, 748 (emphasis added).

The record in this case does not support a taking within the principles of those cases.[49] There has been

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[48] In *United States* v. *Causby*, 328 U. S. 256, it was held that the frequent and continuous flights by airplanes over private property at low altitudes resulted in the taking of an easement, but the Supreme Court emphasized the elements of frequency and regularity, and the Court of Claims had stated in an earlier opinion in the case, "A trespass upon the property of another, however, does not ordinarily constitute a taking, but if it is sufficiently frequent or if there is otherwise shown an intention to continue it at will, such *continued trespasses* or intention may amount to a taking" (*Causby* v. *United States*, 60 F. Supp. 751, 757; emphasis added).

The cases relied on by appellant (App. Br. 30–31) are of that nature, rather than like the case at bar. *E. g.*, *United States* v. *Welch*, 217 U. S. 333, involved a right of way which had been "permanently cut off" by the United States (217 U. S. at 339); in *Duckett & Co.* v. *United States*, 266 U. S. 149, 151, the Government assumed "the possession and control of the piers named, against all the world"; in *United States* v. *General Motors Corp.*, 323 U. S. 373, the destruction of fixtures, held to be compensable, was accompanied by the Government's complete assumption of possession of a leased building; and in *United States* v. *Lynah*, 188 U. S. 445, the building of dams by the United States resulted in a continuous and permanent flooding of plaintiff's land.

[49] Appellant completely overstates the case when it suggests that high explosives are "repeatedly" being tested which "in-

no continuous and permanent and deliberate assertion of dominion over appellant's property. Nothing equivalent to a servitude is involved. There were, instead, only isolated instances of detonations as an unintentional result of which, appellant claims, damage occurred. Isolated and unintentional acts of the United States resulting in damage or destruction of property do not amount to "a taking in a constitutional sense. It is, we think, rather a tortious act for which the government is only consensually liable" (*Harris* v. *United States, supra,* 205 F. 2d at 768). The only remedy for tortious conduct of the United States is that provided under the Tort Claims Act, and, as we have already shown, appellant's claim is not cognizable under that Act.

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variably produce shock waves" which may "in the future" reach and damage its property (App. Br. 31). Appellant offers no record citation for these assertions and the record does not substantiate them. It is because the record shows only the one instance of test firing that no taking is involved. The words of Justice Holmes in *Keokuk & Hamilton Bridge Co.* v. *United States*, *supra*, are applicable here: "* * * it is enough to say that this is an ordinary case of incidental damage which if inflicted by a private individual might be a tort but which could be nothing else." 260 U. S. at 127.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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APPENDIX

1. The provisions of the United States Code and of the Federal Tort Claims Act provide in pertinent part as follows:

28 U. S. C. 1346. UNITED STATES AS DEFENDANT.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U. S. C. 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. The Fifth Amendment of the Constitution of the United States provides in pertinent part as follows:

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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